IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 469 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE S.M.SONI and
MR.JUSTICE M.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

SHANKARBHAI M PALASA

Versus

STATE OF GUJARAT

Appearance:
MR KG SHETH for Petitioner
PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE S.M.SONI and
MR.JUSTICE M.C.PATEL

Date of decision: 24/12/97

ORAL JUDGEMENT (Per Shri S.M.Soni, J)

The appellant originally accused (hereinafter referred to as accused) in S.C.No.88 of 1988 has filed this appeal against the judgment and order of conviction under Sec.302 of the Indian Penal Code and order to undergo rigorous imprisonment for life by the learned Additional Sessions Judge, Valsad, Camp Valsad on 26th

July,1989.

2. The facts of the prosecution case are as under:

In the morning at about 8:00 a.m. of 9th August,1988, one Mohanbhai was informed by his farmer that a dead body of a male person is lying on the grass land at the border of Chanod and Vapi. He prepared a report and informed the Vapi Police Station by the same. On receipt of the report, accidental death was registered being accidental death no.13 of 1988 u/s. 174 of the Criminal Procedure Code. Inquest Panchnama was drawn and the dead body was sent for post-mortem examination. In the meantime photographs of the dead body were taken. On receipt of the medical report from the doctor who performed the post-mortem examination it was found that the death is a homicidal one and an offence under Sec.302 of the Indian Penal Code was registered. Necessary investigation was carried out. On the basis of the photographs dead body was identified as that of Kala Bhima, father of Ramilaben PW7 and brother of Bhagabhai PW4. His clothes were identified which were seized under Panchnama. It was disclosed from the evidence of PW7 that the deceased Kala Bhima had gone in company of accused Shankarbhai Maganbhai for liquor and had not returned back. In the investigation it was found that the deceased in company of Shankarbhai Maganbhai the accused had gone to the house of Ranjanben PW8 to purchase liquor and thereafter Kala Bhima had not reach home and his dead body was found. Investigating officer on completion of the investigation submitted chargesheet against the accused who pleaded not guilty. Prosecution laid necessary evidence to prove the charge. Defence of the accused transpired from the oral evidence was of denial. On completion of the prosecution evidence further statement of the accused was recorded. Accused has not laid any defence evidence. The learned Additional Sessions Judge after hearing the prosecution and defence recorded conviction of the accused under Section 302 and ordered life imprisonment. This judgement and order of the learned Additional Sessions Judge is under challenge in this Appeal Court.

3. The Learned Counsel, Mr.K.G.Sheth, appearing for the accused has challenged the conviction on the ground that there is no evidence worth the name to link the accused with the commission of the crime. Mr.Sheth further contended that the only circumstance that deceased was found in company of the accused in the evening of 8th August,1988 by itself is not a circumstance to lead to an

inference and conclusion that it is he who has committed the murder of deceased Kala Bhima particularly in absence of any other minor or major, important or unimportant circumstances on record. Mr.Sheth further contended that finding of a towel alleged to have been at the instance of the accused even if accepted as evidence then the medical evidence does not corroborate the fact that injury found on the person of the deceased can be caused by such a towel in the manner and alleged or suggested by the doctor. Mr.Sheth further contended that the doctor who performed the post-mortem examination has not stated that the injury found on the neck of the deceased can be caused by a towel if twisted and made a rope. In absence of such evidence even find of towel if accepted does not link with the injury found on the person of the deceased. Mr.Sheth therefore contended that the appeal may be allowed and the accused be acquitted of the charge levelled against him and he should be set at liberty forthwith.

4. Mr.S.T.Mehta, Learned Additional APP supported the judgment of the learned Additional Sessions Judge. Mr.Mehta contended that the deceased was found in the company of the accused in the evening of 8th August,1988, the last night of the deceased. The accused was not found till 11th August,1988 presumably he was absconding. There is an acceptable evidence of discovery of towel at the instance of the accused which could have been used for the purpose of strangulating the deceased as alleged by the prosecution. He therefore contended that circumstance of finding of accused in company of deceased last or where accused was seen in the company of the deceased last is not the only circumstance, but find of towel,injury on the person are the circumstance to support the finding of guilt of the accused.

5. It is not disputed by the appellant that deceased has died a homicidal death. PW2 Dr.Bhirendra Ramrang Pandey has deposed that deceased had the following external injury:

"Abrasions 7"x2" Transion & both sides of the throat on and below Thyroid cartilage in direction of both sides ears (upto direction of both sides ears on the neck.)"

He has also deposed that the deceased had the following internal injury corresponding to that external injury:

"There was laceration of seath of the Lt. carotidartery and effusion with clot was there and rest of the part under the skin of abrasions as noted in col.17 was

congested, but there was echymosis of blood was there below the abrasions."

6. According to him the cause of death is Asphyxia resulting due to Throttling. In his oral evidence he has deposed that by Towel Muddamal no.5 death of a person can be caused by gagging. By throttling a person can die in the ordinary course of nature. In the instant case the death is caused due to throttling. Certain suggestions are made in the cross-examination to the effect that the person suffering from Tuberculosis may suffer from breathlessness or have difficulty in respiration. He has admitted that if a patient of tuberculosis drinks heavily he may suffer suffocation in breathing (Asphyxia). In view of the cause of the death stated in the PM note coupled with external and internal injuries shown in the PM note, it is clear that the deceased has died a homicidal death. The death may be caused as suggested in the cross-examination would be a natural death. In such a death there would be no external injuries involved. In view of these facts it is clear that deceased has died a homicidal death and we do not find reason to interfere with the conclusion arrived at by the learned Additional Sessions Judge on this aspect.

7. It is contended by the learned Counsel Mr.Sheth that the only circumstance of deceased being seen in company of accused by itself is not a circumstance to infer that he has killed the deceased. It is true that the deceased was seen last in the company of accused. Ramilaben, daughter of deceased, as well as Bhagabhai, brother of deceased has deposed to the effect that on 8th August,1988 the deceased has not gone for labour. In the evening of 8th August,1988, Bhagabhai PW4 returned home from labour work when deceased was at home. Ramilaben PW7 had also returned home from the work. When she was preparing for supper the accused came to their house asking her father to join him for having liquor. Her father - deceased asked for Rs.10/- from her which she denied and her father got annoyed with her and she therefore paid the same and then the deceased went in company of Shankarbhai for drinking liquor. Her father did not return at night. Her father did not return back home next day morning also. She was therefore under the impression that he must have gone to the native place.She only came to know about the demise of her father when police showed her the photographs of her father on 11th August,1988. This part of evidence of PW4 and PW7 is required to be accepted as there is nothing in the cross-examination which make their evidence that may be disbelieved. The evidence of PW4 & PW7 that deceased had

gone in company of Shankarbhai for taking liquor is further confirmed by evidence of Ranjanben PW8. She is a liquor vendor. She in her evidence stated that deceased and accused had come to her house, they have purchased 2 bottles of liquor for Rs.12/-, she was paid Rs.10/- only and she had given credit of Rs.2/-. An attempt is made by the learned Additional Public Prosecutor to show that she has stated something more than she has deposed on oath before the court. Learned APP sought permission to confront the witness with such statement without declaring her hostile. However such permission was granted and what was not stated before the court as alleged by APP is to the following effect:-

"However she has denied to have so stated before the police. According to the police she has stated in a statement that both of them drank sitting besides my house. Both of them left my house after taking liquor. Both of them were quarrelling interse. Both of them left my house speaking abuses."

8. Even if we assume that this was the state of affair at the relevant time and in the condition both of them have left the house of PW8 then also something more is required by the prosecution to hold that it is the accused and accused alone who has committed murder of the deceased whose dead body was found on the next day. In our opinion there is nothing on record to show any motive or intention on the part of the accused to commit this murder. No motive or intention is even suggested by the prosecution. On the contrary both appear to be friends,both used to go together for taking liquor,both are employed in different fields, deceased was doing labour work with PWD and accused is working in some factory as a labourer. Both of them have no animosity in respect of any aspect as it appears from the record. In absence of any enimosity,any motive,any intention we may hasten to make it clear that if a case of murder is proved these things are not required to be established, is a circumstance in favour of accused. In the facts and circumstance of this case, absence of this motive,intention, something to be shared is relevant to establish nexus of the accused with the crime. As any of these things are not present the accused being seen together last in the company of the deceased would not itself be a circumstance to hold him guilty for the death of the accused.

9. We are supported in our view by the observations made in the case of Inderjit Gupta and another V/s. State of Punjab reported in AIR 1991,SC, Pg.1674. The relevant

observation reads as under:

"The circumstances so proved must also be consistent only with the guilt of the accused. Among the circumstances relied upon by the prosecution in the light of these principles it is well settled that in a case pending on circumstantial evidence, the prosecution must establish all the circumstances by independent evidence and the circumstances so established must form a complete chain in proof of guilt of the accused beyond all reasonable doubts. The circumstances so proved must also be consistent only with the guilt of the accused. Among the circumstances relied upon the prosecution, in the light of these principles we find that except the circumstance No.1, the other circumstances are not incriminating. In number of cases it has been held that the only circumstance namely that the deceased was last seen in the company of the accused by itself is not sufficient to establish the guilt of the accused. It is not doubt true that the deceased's death was homicidal but since there is no direct witness connecting any of the appellants with the crime we should fall back on the circumstantial evidence and we are of the view that circumstances relied upon by the prosecution are hardly sufficient to establish the guilt of the accused."

10. In the instant case, except the evidence of PW4,PW7 & PW8 having seen the deceased last in the company of the accused there is nothing more on record to lead further to involve the accused to held him guilty of the offence charged. There is nothing on record even to show that the accused was absconding thereafter. Under the circumstances the finding arrived by the learned Additional Sessions Judge cannot be sustained. In our view the conclusion arrived by the learned Additional Sessions Judge is passed on wrong principle of burden of proof, that is what is not required to be established and explained by the accused by the learned Additional Sessions Judge. Thus the appeal is liable to be allowed. Order of conviction under Section 302 of Indian Penal Code recorded against the accused and sentence of life imprisonment against the appellant Shankarbhai Maganbhai is quashed and set aside. Accused be set at liberty forthwith, if not required by the court in any other case.